



6712-01

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MB Docket No. 07-42; FCC 07-208]

Leased Commercial Access

AGENCY: Federal Communications Commission.

ACTION: Technical amendments.

SUMMARY: The Federal Communications Commission (FCC) is making a technical amendment to correct a final rule that appeared in the Federal Register of February 28, 2008. The document revised rules concerning Leased Commercial Access. Some of the revised rules contained information collections that required approval by OMB. Some other revised rules were held in abeyance pending OMB approval. Finally, some rule revisions were effective without OMB approval. The entire order, FCC 07-208, was judicially stayed pending judicial review, which is being held in abeyance, and no rule revisions have become effective.

Therefore, the previously published rules are still in effect. This document makes a technical amendment so that the rules that are published in the Federal Register reflect the Leased Commercial Access rules that have remained in effect continuously and are currently still in effect.

DATES: Effective [INSERT DATE OF PUBLICATION DATE IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact Katie Costello, Katie.Costello@fcc.gov of the Media Bureau, Policy Division, (202) 418-2233.

SUPPLEMENTARY INFORMATION: We published a final rule document at 73 FR 10675, February 28, 2008, revising rules sections 76.970 and 76.975, and adding sections 76.972 and 76.978, concerning Leased Commercial Access. These rules contained information collections that required approval by OMB which was denied. The entire Order [FCC 07-208] was judicially stayed pending judicial review by the United States Court of Appeals for the Sixth Circuit in *United Church of Christ v. FCC*, 6th Cir. No. 08-3245 (and consolidated cases) (order issued May 22, 2008). OMB disapproved the requested revisions to the rules that were subject to OMB approval by Notice of Action dated July 9, 2008. Subsequently the Court issued an order granting an FCC motion to hold the judicial review in abeyance pending further action by the FCC in response to OMB's disapproval. The Federal court stay of the Order and the hold on further judicial review remain in effect. Our previous rules 76.970 and 76.975 remain in effect and are re-published herein. New sections 76.972 and 76.978 are removed entirely.

Accordingly, the following correcting amendments are made to restore the rules that are still in effect. The OMB Control Number for this information collection is 3060-0568.

List of Subjects in 47 CFR Part 76

Administrative practice and procedure and Cable television.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Accordingly, 47 CFR part 76 is corrected by making the following technical amendments:

PART 76--MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. The authority citation for part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 339, 340, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572 and 573.

2. Revise §76.970 to read as follows:

§ 76.970 Commercial leased access rates.

(a) Cable operators shall designate channel capacity for commercial use by persons unaffiliated with the operator in accordance with the requirement of 47 U.S.C. 532. For purposes of 47 U.S.C. 532(b)(1)(A) and (B), only those channels that must be carried pursuant to 47 U.S.C. 534 and 535 qualify as channels that are required for use by Federal law or regulation. For cable systems with 100 or fewer channels, channels that cannot be used due to technical and safety regulations of the Federal Government (e.g., aeronautical channels) shall be excluded when calculating the set-aside requirement.

(b) In determining whether an entity is an “affiliate” for purposes of commercial leased access, entities are affiliated if either entity has an attributable interest in the other or if a third party has an attributable interest in both entities.

(c) Attributable interest shall be defined by reference to the criteria set forth in Notes 1-5 to § 76.501 provided, however, that:

(1) The limited partner and LLC/LLP/RLLP insulation provisions of Note 2(f) shall not apply; and;

(2) The provisions of Note 2(a) regarding five (5) percent interests shall include all voting or nonvoting stock or limited partnership equity interests of five (5) percent or more.

(d) The maximum commercial leased access rate that a cable operator may charge for full-time channel placement on a tier exceeding a subscriber penetration of 50 percent is the average implicit fee for full-time channel placement on all such tier(s).

(e) The average implicit fee identified in paragraph (c) of this section for a full-time channel on a tier with a subscriber penetration over 50 percent shall be calculated by first calculating the total amount the operator receives in subscriber revenue per month for the programming on all such tier(s), and then subtracting the total amount it pays in programming costs per month for such tier(s) (the “total implicit fee calculation”). A weighting scheme that accounts for differences in the number of subscribers and channels on all such tier(s) must be used to determine how much of the total implicit fee calculation will be recovered from any particular tier. The weighting scheme is determined in two steps. First, the number of subscribers is multiplied by the number of channels (the result is the number of “subscriber-channels”) on each tier with subscriber penetration over 50 percent. For instance, a tier with 10 channels and 1,000 subscribers would have a total of 10,000 subscriber-channels. Second, the subscriber-channels on each of these tiers is divided by the total subscriber-channels on all such tiers. Given the percent of subscriber-channels for the particular tier, the implicit fee for the tier is computed by multiplying the subscriber-channel percentage for the tier by the total implicit fee calculation. Finally, to calculate the average implicit fee per channel, the implicit fee for the tier must be divided by the corresponding number of channels on the tier. The final result is the maximum rate per month that the operator may charge the leased access programmer for a full-time channel on that particular tier. The average implicit fee shall be calculated by using all channels carried on any tier exceeding 50 percent subscriber penetration (including channels devoted to affiliated programming, must-carry and public, educational and government access channels). In the event

of an agreement to lease capacity on a tier with less than 50 percent penetration, the average implicit fee should be determined on the basis of subscriber revenues and programming costs for that tier alone. The license fees for affiliated channels used in determining the average implicit fee shall reflect the prevailing company prices offered in the marketplace to third parties. If a prevailing company price does not exist, the license fee for that programming shall be priced at the programmer's cost or the fair market value, whichever is lower. The average implicit fee shall be based on contracts in effect in the previous calendar year. The implicit fee for a contracted service may not include fees, stated or implied, for services other than the provision of channel capacity (e.g., billing and collection, marketing, or studio services).

(f) The maximum commercial leased access rate that a cable operator may charge for full-time channel placement as an a la carte service is the highest implicit fee on an aggregate basis for full-time channel placement as an a la carte service.

(g) The highest implicit fee on an aggregate basis for full-time channel placement as an a la carte service shall be calculated by first determining the total amount received by the operator in subscriber revenue per month for each non-leased access a la carte channel on its system (including affiliated a la carte channels) and deducting the total amount paid by the operator in programming costs (including license and copyright fees) per month for programming on such individual channels. This calculation will result in implicit fees determined on an aggregate basis, and the highest of these implicit fees shall be the maximum rate per month that the operator may charge the leased access programmer for placement as a full-time a la carte channel. The license fees for affiliated channels used in determining the highest implicit fee shall reflect the prevailing company prices offered in the marketplace to third parties. If a prevailing company price does not exist, the license fee for that programming shall be priced at the

programmer's cost or the fair market value, whichever is lower. The highest implicit fee shall be based on contracts in effect in the previous calendar year. The implicit fee for a contracted service may not include fees, stated or implied, for services other than the provision of channel capacity (e.g., billing and collection, marketing, or studio services). Any subscriber revenue received by a cable operator for an a la carte leased access service shall be passed through to the leased access programmer.

(h) The maximum commercial leased access rate that a cable operator may charge for part-time channel placement shall be determined by either prorating the maximum full-time rate uniformly, or by developing a schedule of and applying different rates for different times of the day, provided that the total of the rates for a 24-hour period does not exceed the maximum daily leased access rate.

(i)(1) Cable system operators shall provide prospective leased access programmers with the following information within 15 calendar days of the date on which a request for leased access information is made:

- (i) How much of the operator's leased access set-aside capacity is available;
- (ii) A complete schedule of the operator's full-time and part-time leased access rates;
- (iii) Rates associated with technical and studio costs; and
- (iv) If specifically requested, a sample leased access contract.

(2) Operators of systems subject to small system relief shall provide the information required in paragraph (h)(1) of this section within 30 calendar days of a bona fide request from a prospective leased access programmer. For these purposes, systems subject to small system relief are systems that either:

(i) Qualify as small systems under § 76.901(c) and are owned by a small cable company as defined under § 76.901(e); or

(ii) Have been granted special relief.

(3) Bona fide requests, as used in this section, are defined as requests from potential leased access programmers that have provided the following information:

(i) The desired length of a contract term;

(ii) The time slot desired;

(iii) The anticipated commencement date for carriage; and

(iv) The nature of the programming.

(4) All requests for leased access must be made in writing and must specify the date on which the request was sent to the operator.

(5) Operators shall maintain, for Commission inspection, sufficient supporting documentation to justify the scheduled rates, including supporting contracts, calculations of the implicit fees, and justifications for all adjustments.

(j) Cable operators are permitted to negotiate rates below the maximum rates permitted in paragraphs (c) through (g) of this section.

§ 76.972 [Removed]

3. Remove § 76.972.

4. Revise § 76.975 to read as follows:

§ 76.975 Commercial leased access dispute resolution.

(a) Any person aggrieved by the failure or refusal of a cable operator to make commercial channel capacity available in accordance with the provisions of Title VI of the Communications

Act may bring an action in the district court of the United States for the Judicial district in which the cable system is located to compel that such capacity be made available.

(b)(1) Any person aggrieved by the failure or refusal of a cable operator to make commercial channel capacity available or to charge rates for such capacity in accordance with the provisions of Title VI of the Communications Act, or our implementing regulations, §§ 76.970 and 76.971, may file a petition for relief with the Commission. Persons alleging that a cable operator's leased access rate is unreasonable must receive a determination of the cable operator's maximum permitted rate from an independent accountant prior to filing a petition for relief with the Commission.

(2) Parties to a dispute over leased access rates shall have five business days to agree on a mutually acceptable accountant from the date on which the programmer provides the cable operator with a written request for a review of its leased access rates. Parties that fail to agree on a mutually acceptable accountant within five business days of the programmer's request for a review shall each be required to select an independent accountant on the sixth business day. The two accountants selected shall have five business days to select a third independent accountant to perform the review. Operators of systems subject to small system relief shall have 14 business days to select an independent accountant when an agreement cannot be reached. For these purposes, systems subject to small system relief are systems that either:

(i) Qualify as small systems under § 76.901(c) and are owned by a small cable company as defined under § 76.901(e); or

(ii) Have been granted special relief.

(3) The final accountant's report must be completed within 60 days of the date on which the final accountant is selected to perform the review. The final accountant's report must, at a minimum,

state the maximum permitted rate, and explain how it was determined without revealing proprietary information. The report must be signed, dated and certified by the accountant. The report shall be filed in the cable system's local public file.

(4) If the accountant's report indicates that the cable operator's leased access rate exceeds the maximum permitted rate by more than a de minimis amount, the cable operator shall be required to pay the full cost of the review. If the final accountant's report does not indicate that the cable operator's leased access rate exceeds the maximum permitted rate by more than a de minimis amount, each party shall be required to split the cost of the final accountant's review, and to pay its own expenses incurred in making the review.

(5) Parties may use alternative dispute resolution (ADR) processes to settle disputes that are not resolved by the final accountant's report.

(c) A petition must contain a concise statement of the facts constituting a violation of the statute or the Commission's rules, the specific statute(s) or rule(s) violated, and certify that the petition was served on the cable operator. Where a petition is based on allegations that a cable operator's leased access rates are unreasonable, the petitioner must attach a copy of the final accountant's report. In proceedings before the Commission, there will be a rebuttable presumption that the final accountant's report is correct.

(d) Where a petition is not based on allegations that a cable operator's leased access rates are unreasonable, the petition must be filed within 60 days of the alleged violation. Where a petition is based on allegations that the cable operator's leased access rates are unreasonable, the petition must be filed within 60 days of the final accountant's report, or within 60 days of the termination of ADR proceedings. Aggrieved parties must certify that their petition was filed within 60 days

of the termination of ADR proceedings in order to file a petition later than 60 days after completion of the final accountant's report. Cable operators may rebut such certifications.

(e) The cable operator or other respondent will have 30 days from the filing of the petition to file a response. If a leased access rate is disputed, the response must show that the rate charged is not higher than the maximum permitted rate for such leased access, and must be supported by the affidavit of a responsible company official. If, after a response is submitted, the staff finds a prima facie violation of our rules, the staff may require a respondent to produce additional information, or specify other procedures necessary for resolution of the proceeding.

(f) The Commission, after consideration of the pleadings, may grant the relief requested, in whole or in part, including, but not limited to ordering refunds, injunctive measures, or forfeitures pursuant 47 U.S.C. 503, denying the petition, or issuing a ruling on the petition or dispute.

(g) To be afforded relief, the petitioner must show by clear and convincing evidence that the cable operator has violated the Commission's leased access provisions in 47 U.S.C. 532 or §§ 76.970 and 76.971, or otherwise acted unreasonably or in bad faith in failing or refusing to make capacity available or to charge lawful rates for such capacity to an unaffiliated leased access programmer.

(h) During the pendency of a dispute, a party seeking to lease channel capacity for commercial purposes, shall comply with the rates, terms and conditions prescribed by the cable operator, subject to refund or other appropriate remedy.

§ 76.978 [Removed]

5. Remove §76.978.

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